FEDERAL PROTECTION AGAINST STATE POWER.

NEARLY sixty years ago Chief Justice Marshall, speaking for the Supreme Court of the United States,[1] formulated a canon of construction for the amendments to the Federal Constitution, based upon a consideration of the circumstances under which they were adopted and the nature of the Constitution itself: leading to the result that the first eight, containing general guarantees of civil and religious liberty and of protection to person and property, are limitations only upon the federal power, and cannot be invoked as against an exercise of power by the States.

The arguments for this construction are principally these: The Constitution provides for the federal government, state governments being already in existence at the time of its adoption; and limitations are to be deemed applicable, therefore, to power conferred by the Constitution, except as they are expressly made applicable to the States. For instance, in Sec. 9 of Art. 1 is the general provision that no bill of attainder or *ex post facto* law shall be passed, while in the next section States are expressly prohibited from passing such laws; it being evidently assumed that the general prohibition would apply to Congress only. The historical fact that objection was made in the state conventions called to act upon the Federal Constitution because the instrument did not contain a general bill of rights as a protection to the people against the government provided for by it, and that in consequence of such suggestions by the States, Congress at its first session proposed these amendments among others, indicates most conclusively that they were intended as a limitation on federal power, and not on state power.

The conclusion reached by Chief Justice Marshall has been accepted in a long line of decisions by the Supreme Court, reaching to the present time, and has been acquiesced in as final and conclusive by all writers on constitutional law.[2]

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[1] Barron *v.* City of Baltimore, 7 Peters, 243.

[2] Story on the Constitution, secs. 301–305, and 1857–1868; Cooley, Const. Lim. (6th ed.), 29; Hare, Am. Const. Law, ch. 24.

The case of Barron *v.* City of Baltimore, already referred to, was one in which the provision of the sixth amendment prohibiting the taking of private property for a public use without just compensation was invoked as against a state statute, and was held not applicable. The same doctrine has been announced with reference to provisions as to jury trial in suits at common law,[1] as to criminal prosecutions in general,[2] as to previous jeopardy,[3] as to cruel and unusual punishments,[4] as to issuing warrants only on probable cause supported by oath,[5] as to the right to peaceably assemble,[6] and as to the right to bear arms.[7]

Notwithstanding the cogency of this reasoning and the conclusiveness of these authorities, constant efforts have been made to break down the doctrine, and these efforts have finally received encouragement from members of the court. In the case involving the right to bear arms,[8] and again in the Anarchists' case,[9] counsel very strongly insisted that the rights, privileges, and immunities protected by the first eight amendments against federal interference constitute the privileges and immunities of citizens of the United States which the States are, by the fourteenth amendment, forbidden to abridge. In the Presser case it was distinctly announced by the Supreme Court that the right to bear arms, mentioned in the first amendment, is not an attribute of national citizenship, likening the case to that of United States *v.* Cruikshank,[10] where it was held that the right to peaceably assemble was guaranteed as against state action only so far as it was involved in the exercise of the right to petition the federal government. In the Anarchists' case[11] the court, after reaffirming the doctrine that the eight amendments are only limitations on federal power, recognizes the point urged under the fourteenth amendment, but, after an elaborate consideration of the statutes of Illinois and the evidence presented by the record, comes to the conclusion that there was nothing in the case to raise the question as to whether that amendment preserves to the citizen as against his State the privileges and immunities enumerated in the eight amendments. The question so elaborately and forcibly

1 Walker *v.* Sauvinet, 92 U. S. 90.
2 Twitchell *v.* Commonwealth, 7 Wall. 321.
3 Fox *v.* Ohio, 5 How. 410.
4 Pervear *v.* Commonwealth, 5 Wall. 475; *In re* Kemmler, 136 U. S. 436.
5 Smith *v.* Maryland, 18 How. 71.
6 United States *v.* Cruikshank, 92 U. S. 542.
7 Presser *v.* Illinois, 116 U. S. 252.
8 Presser *v.* Illinois, 116 U. S. 252.
9 Spies *v.* Illinois, 123 U. S. 131.
10 92 U. S. 542.
11 Spies *v.* Illinois, 123 U. S. 131.

argued, to the effect that these privileges and immunities are by the fourteenth amendment protected against state action, was therefore not passed upon by the court.

In the Kemmler case,[1] the question being whether the statute of New York providing for execution by electricity was unconstitutional, as in violation of the eighth amendment to the Federal Constitution, forbidding cruel and unusual punishments, or the "privileges and immunities" or "due process of law" clauses of the fourteenth amendment, the court, without division, or, apparently, serious difficulty, held that the eighth amendment was not applicable to the States, and that protection to life, liberty, and property still rests primarily with them, and that the "privileges and immunities" guaranteed are those arising out of the nature and essential character of the national government. But it is evident that the court felt that the punishment of death by electricity was not a "cruel and unusual" punishment in cases where capital punishment is proper.

In view of the fact that the question as to whether the privileges and immunities guaranteed in the eight amendments as against federal infringement constitute privileges and immunities which the States are by the fourteenth amendment forbidden to abridge has thus not seemed to have attracted the attention of the court in previous cases as being vital, it is perhaps not surprising that in a recent case it should have occasioned a most serious division. In O'Neil *v.* Vermont,[2] decided in April, 1892, the question was whether a conviction in Vermont for violation of the laws of that State with reference to the sale of intoxicating liquors by shipping the same into the State by express to fill orders for private consumers, and a sentence (in accordance with special provisions of the State law) for repeated violations charged in one count, which would involve payment of fines to the amount of over six thousand dollars, or, on default, confinement at hard labor for over fifty-four years, infringed any provisions of the Federal Constitution. In the opinion of a majority of the court no federal question appeared on the record; but three judges were of the opinion that it sufficiently appeared that the defendant in the state court claimed the protection of the commerce clause, and also of the provision against cruel and unusual punishments; and these three judges held that not only as to the commerce clause, but also as to the clause relating to pun-

[1] 136 U. S. 436.

[2] 144 U. S. 323; 12 Sup. Ct. Rep. 693.

ishments, the decision of the state court denied and abridged the privileges and immunities of defendant under the Federal Constitution, and was in violation of the law of the land.

Here, then, with three judges insisting that the fourteenth amendment extends the protection of the Federal Constitution, as against state action, to the privileges and immunities which by the first eight amendments were originally secured by that charter only as against federal abridgment and the other six judges expressing no opinion on that question, but only claiming that the case did not call for any expression of view in reference thereto, there is a controversy of far-reaching importance. As indicating what solution of that question is likely to be reached when it does come squarely before the court, it is important to notice, first, decisions of the court on analogous questions; secondly, considerations of expediency bearing upon the probable intention with which the constitutional provisions in question were adopted.

The adoption by the Supreme Court of the doctrine contended for by counsel in the Spies and Presser cases, and accepted by the dissenting judges in the O'Neil case, would overrule two classes of decisions in that court: First, those in which the established doctrine of the court with reference to the effect of the eight amendments prior to the adoption of the fourteenth amendment has been recognized as applicable since the adoption of that amendment.[1] These cases are few, and in some of them the objection now made under the fourteenth amendment was not considered; but they are important in defining the relations between the federal government and the States, and to overrule them would seriously interfere with state legislation. For instance, in a number of the States the grand jury system is modified or abolished; and this has been held to be entirely within state control.[2] The power of States to regulate the right of jury trial in state courts, and to abolish it if found expedient to do so, is generally assumed, and is recognized.[3] But under the doctrine adopted by the dissenting judges in the O'Neil case, no person could in a state court be put on trial for a capital or

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[1] The Justices *v.* Murray, 9 Wall. 274; United States *v.* Cruikshank, 92 U. S. 542, 552; Kelly *v.* Pittsburg, 104 U. S. 78, Spies *v.* Illinois, 123 U. S. 131, 166; Presser *v.* Illinois, 116 U. S. 252, 265.

[2] Hurtado *v.* California, 110 U. S. 516 (Harlan, J., *dissenting*, Field, J., *not taking part*).

[3] Edwards *v.* Elliott, 21 Wall. 532, 557; Walker *v.* Sauvinet, 92 U. S. 90 (Field and Clifford, JJ., *dissenting*); Pearson *v.* Yewdall, 95 U. S. 294.

otherwise infamous offence except upon indictment concurred in by twelve grand jurors; and in suits at common law where the value in controversy exceeds twenty dollars the right to trial by jury of twelve, rendering no verdict unless unanimous, must not be impaired. Second, the doctrine in question would overrule those cases which relate to the nature of the fourteenth amendment and explain its origin and purpose, holding that it was not intended thereby to extend federal protection to the citizens of the States in the enjoyment of rights which pertain to them as citizens of a free government.[1]

Considerations of expediency which must have been in the minds of the framers of the Federal Constitution when it was adopted, and which retain their force, notwithstanding the fourteenth amendment and the enlarged scope of the federal government which it signifies, can be stated in a few words. States which differ as essentially in the origin, customs, and local needs of their people as do Massachusetts, Virginia, Louisiana, and California, ought not to be required to conform themselves to the same forms of legal procedure, nor to the same rate and direction of legal development; nor should legal development be hampered by the necessity of securing federal action for each progressive step. It ought to be possible to take the initiative in law reform in any State where circumstances make it practicable, allowing the success or failure of the experiment to exercise an influence in determining whether such experiment shall be tried in other States. Elasticity, within the limits imposed by the necessity of federal union and the maintenance of a republican form of government, is more desirable than uniformity, and opportunity for growth is to be prized far above a technical conformity to a legal system which, however justly prized at one time in the country of its origin, was framed under institutions distinctly different from ours, and which the people among whom it originated have shown their willingness to change radically, in order to adapt it to their own development.

Emlin McClain.

LAW DEPARTMENT, STATE UNIVERSITY OF IOWA.

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[1] Slaughter-House Cases, 16 Wall. 36, 73; United States *v.* Cruikshank, 92 U. S. 542; Davidson *v.* New Orleans, 96 U. S. 97; Presser *v.* Illinois, 116 U. S. 252, 256; *In re* Kemmler, 136 U. S. 436.